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In the Supreme Court of the United States

OCTOBER TERM, 1977

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

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This case involves the Federal Power Commission's rejection of a proposed settlement agreement which determined natural gas entitlements of the customers of Transcontinental Gas Pipe Line Corporation ("Transco") for the period November 1974 through October 1975. The rejection was based on the plan's inclusion of a compensation scheme described below.

This case has previously been before this Court, when the Court summarily reversed an order by the court of appeals remanding the case to the Commission. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326. Transco now seeks certiorari from another remand order by that court issued November 29, 1976, which appears at Pet. App. A, pp. 1a-22a.

The settlement agreement at issue was filed by Transco in September 1974 and established an interim plan for the curtailment of gas deliveries to Transco's customers in 1974-1975 based on a shortage in Transco's supplies. The agreement embodied both a plan for the allocation of natural gas supplies among Transco's customers and a monetary compensation scheme under which customers who received more gas than the system-wide average would compensate customers who received less gas than the average.

The Commission found the compensation feature of the plan "patently unlawful," in part because "it would require high priority jurisdictional customers to pay increased rates which are unrelated to the pipeline's cost of service plus reasonable rate of return."[1] The Commission accordingly rejected the plan.

Transco then filed, under protest, an interim curtailment plan without the offending compensation feature. However, it also sought from the court of appeals an order directing the implementation of the 1974-1975 plan that the Commission had rejected. The court directed that the plan be placed in effect and that compensation payments under the plan be paid into an escrow account pending determination of the lawfulness of the compensation feature. *Consolidated Edison Co.* v. *Federal Power Commission*, 511 F. 2d 372, 381 (C.A. D.C.).

On August 1, 1975, after oral argument on petitions to review the Commission's order, the court of appeals directed the Commission to conduct an investigation into Transco's claim of need for curtailment. The court directed

[1]Order Finding An Emergency on Transco's System and Denying Motion for Interim Settlement As to Curtailment Rules, FPC Docket No. RP72-99 (November 12, 1974) at 13.

the Commission to subpoena Transco's books and records, conduct a field survey, and complete the investigation and report back to the court within 30 days (Pet. App. D, pp. 27a-34a). A stay of the court's order was obtained from this Court pending the filing and determination of a petition for a writ of certiorari. On January 19, 1976, this Court granted the petition and summarily reversed. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp., supra.*

This Court "agree[d] with the Court of Appeals that the existence of actual shortage of gas supplies forms the factual predicate necessary for the Commission's assertion of authority * * * to approve the curtailment of gas already contracted for." 423 U.S. at 331. However, the Court held that the court of appeals had exceeded its authority in "dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without the opportunity for further consideration on the basis of the new evidence by the agency." 423 U.S. at 333.

On the need for the inquiry, the Court stated (423 U.S. at 334):

> We are unable to determine with certainty, from this vantage point and on the partial record now before us, whether the evidence regarding Transco's actual shortage with which the instant order is concerned is absolutely essential to a decision by the Court of Appeals on the issues presently before that court for review. Although Judge MacKinnon in his separate statement was apparently of the view that it was not, it is at least conceivable that the Court of Appeals could determine that the lawfulness of the proposed compensation scheme is partially a function of the actual severity of the shortage. Cf. *FPC*

> v. *Louisiana Power & Light Co.* [406 U.S. 621]. Accordingly, the court below is free on remand either to proceed to the merits of the issues presented by the compensation scheme and only thereafter deal with the adequacy of the record in regard to the evidence of shortage, or immediately remand the case to the Commission for the required inquiry. It is apparent that under neither alternative need the Court of Appeals' ability fully and effectively to review the administrative process regarding the implementation of curtailment plans and their underlying factual premises be relinquished.

Noting "the potential importance of a resolution on the merits of the compensation issues presented by the instant case," this Court then remanded the case for "swift and priority consideration of this case by the Court of Appeals on remand * * *." 423 U.S. at 334-335.

On February 6, 1976, the court of appeals remanded the case to the Commission,[2] stating that it "* * * could [not] fairly consider 'the lawfulness of the proposed compensation scheme' unless the Commission has first fulfilled its duty to determine whether a real shortage exists * * *" (Pet. App. E, p. 39a). The court concluded that "'the evidence regarding Transco's actual shortage with which the instant order is concerned is absolutely essential to * * * decision' of the instant case" (*id.* at 38a). Judge MacKinnon dissented from this conclusion. He would have reached the merits and would have upheld the Commission's ruling that "the compensation scheme constituted an undue discrimination" (*id.* at 42a).

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[2] *Transcontinental Gas Pipe Line Corporation* v. *Federal Power Commission*, No. 74-2036, (D.C. Cir., February 6, 1976 (unpublished *per curiam*)) (Pet. App. E, pp. 35a-43a).

On June 25, 1976, the Commission issued its order on remand (Pet. App. F, pp. 44a-51a), finding (*id.* at p. 51a):

> Upon consideration of the mandate of the remand by the Court of Appeals and record evidence properly before the Commission we find that a natural gas supply shortage has in the past and continues to exist on Transco's system which has necessitated some curtailment of service to Transco's customers.

The next day, the Commission lodged the order with the court of appeals together with supporting documents, which included a stipulation by all of the parties to the Transco proceeding that Transco's available supply of natural gas "has been declining since 1971 and has been, and continues to be, insufficient to enable Transco to satisfy the certificated requirements of its customers" (Pet. App. H, p. 55a). The Commission also submitted the affidavit of Wayne M. Thompson, a Commission expert, who described the results of a deliverability study covering 18 randomly selected fields supplying 11.9% of Transco's available gas. Mr. Thompson's principal conclusion was that "for these 18 fields, Transco's deliverability estimates were reasonably accurate" (Pet. App. F, p. 50a). Mr. Thompson also stated "that a further [staff] review of 19 additional fields accounting for approximately 9% of Transco's gas supply did not change his opinion * * *" (Pet. App. H, pp. 55a-56a).

On November 29, 1976, the court of appeals issued the decision that this Court is now asked to review. The court again declined "to assess the legality of the compensation scheme at issue here" (Pet. App. A, p. 14a) and for the third time remanded the record to the Commission (Pet. App. A, pp. 1a-22a). Petitioner Transco seeks certiorari.

Central to the court of appeals' decision was its conclusion that the Commission's "deliverability study" was inadequate to determine the need for curtailment and, hence, for compensation (Pet. App. A, p. 10a):

> Diminished deliverability does not necessarily constitute substantial evidence of actual and legitimate long-term shortage if, for example, a pipeline or producer could, by more or less simple acts, make its proved reserves more deliverable. Similarly, diminished proved reserves may not support a finding of long-run shortage if by physically and economically achievable acts lying entirely within the control of a pipeline or producer, sizeable reservoirs of gas might be moved from the 'possible' or 'probable' categories into the category of 'proved reserves'.

Accordingly the court again (Pet. App. A, pp. 12a-13a) remanded the case to the Commission for development of—

> substantial information regarding the duration, shape, and causation of the shortage on the Transco system. Such information is simply not provided by deliverability data alone. We believe that the legality of compensation may well turn, at least in part, on answers to the following sorts of questions: Are sufficient volumes of gas available as proved or provable reserves so that greater total deliverability can be foreseen in the short-term future? Are present levels of curtailment likely to continue for the indefinite future, or to deepen? And more specifically: will compensation be a short-term financial adjustment between customers of the the pipeline to keep some of those customers financially afloat until the supply situation stabilizes, or wi.. it be a permanent cross-subsidization? We believe that without such

> information, neither the Commission nor the court can hope to give meaning to statutory terms such as "rates," "charges," and "classes of service" in a regulatory landscape vastly altered by end-use curtailment.

Judge MacKinnon again dissented. He noted that none of the parties had disputed the existence of a shortage in Transco's system, and observed that "the majority, apparently obsessed with the idea that there is no actual gas or oil shortage, have taken the bit in their teeth and *sua sponte* determined to compel the Commission to make an extensive and complex investigation, study and report on that issue" (Pet. App. A, pp. 15a-17a). Judge MacKinnon concluded that (Pet. App. A, pp. 21a-22a):

> * * * the majority are overcomplicating the case, unreasonably burdening the parties without any assurance that it is necessary to do so, and unreasonably delaying a decision on the facial validity of the compensation scheme.

On January 18, 1977, the court of appeals by an evenly divided vote denied the Commission's suggestion for rehearing *en banc* (Pet. App. B, pp. 23a-24a), and the panel denied the Commission's petition for rehearing (Pet. App. C, pp. 25a-26a).

Petitioner challenges the court of appeals' order on two grounds: first, that the court abused its discretion and overstepped the bounds of proper judicial review by ordering a remand to determine the "duration, shape, and causation" of the alleged shortage; and second, that given the Commission's finding that a natural gas shortage did exist on Transco's system, the "duration, shape, and causation" of such a shortage has no substantial bearing on the legality of the compensation scheme contained in Transco's curtailment plan (Pet. 7-12).

We agree with both contentions.

1. Under Section 19(b) of the Natural Gas Act, 52 Stat. 831, as amended, 15 U.S.C. 717r(b), a court of appeals reviewing a Federal Power Commission order has authority "to affirm, modify, or set aside such order in whole or in part." "But that authority is not power to exercise an essentially administrative function." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 21.

In its earlier decision in this case, *supra*, this Court held that the court of appeals by its initial remand order had "overstepped the bounds of its reviewing authority," which ordinarily "is to be confined to 'consideration of the decision of the agency * * * and of the evidence on which it was based,' *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 714-715 (1963)." 423 U.S. at 331. While the court of appeals this time has avoided some of its earlier errors (*e.g.*, by not setting a deadline for the Commission's investigation), it has again "propel[led] the court into the domain which Congress has set aside exclusively for the administrative agency. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947)." 423 U.S. at 333.

The central issue in this proceeding is whether a curtailment plan that includes a compensation scheme by which customers receiving more gas than the system-wide average compensate those receiving less is unlawful under the Natural Gas Act. This is an important and recurring issue under the Act and needs to be resolved. The panel of the court of appeals in this case has put off resolving it for three years. The panel has now remanded to the Commission for the third time for an inquiry that not only thrusts the judiciary into the province of administrative agencies (and of legislative organs that are also considering the problem of energy supply), but that has no substantial relevance to the legal issue in this case.

2. The court-ordered inquiry would shed little light on the issues presented here. To be sure, this Court has stated that the "actual shortage of gas supplies forms the factual predicate necessary for the Commission's * * * authority * * * to approve the curtailment of gas already contracted for" (423 U.S. at 331), and that "it is at least conceivable that the Court of Appeals could determine that the lawfulness of the proposed compensation scheme is partially a function of the actual severity of the shortage" (*id.* at 334). But the necessary factual predicates have been amply established.

As noted above, pp. 4-5, *supra*, in response to the court's second remand of February 6, 1976, the Commission on June 26, 1976, submitted to the court its finding that "a natural gas supply shortage has in the past and continues to exist on Transco's system which has necessitated some curtailment of service to Transco's customers" (Pet. App. F, p. 51a). Supporting this finding were (1) a stipulation of all parties that during the 1974-1975 period covered by the compensation plan at issue, Transco's natural gas was "insufficient to enable Transco to satisfy the certificated requirements of its customers" (Pet. App. H, p. 55a), and (2) an unchallenged gas deliverability study by a Commission staff expert confirming the need for curtailment.

While the court of appeals disparaged the Commission's study as not "constitut[ing] substantial evidence of actual and legitimate long term shortage * * *" (Pet. App. A, p. 10a), evidence as to the long-term duration of the shortage has little if any relevance to the lawfulness of compensation during the 1974-1975 period to which the Commission's orders relate and in which there was a proved "actual * * * shortage." The Commission presented evidence based on its deliverability studies showing that "actual" curtailments did take place during that period and demonstrating the need

for such curtailments.[3] This finding is consistent with this Court's recognition in *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 626, of "a pattern of temporary and chronic natural gas shortages throughout the Nation." If, as the Commission found, there was an actual shortage of gas during the period in question, the necessary factual predicate for the determination of the validity of the compensation scheme is established. The case therefore called for that determination on the existing record.

3. Although the court of appeals' decision is incorrect, its effects appear to be limited to this case. A case currently pending before a different panel of the District of Columbia Circuit presents the issue of the lawfulness of compensation schemes similar to the scheme involved in this case.[4] On

[3]The court of appeals, however, on the basis of its view that the relevant inquiry should focus on the long-term duration of the shortage, concluded that the Commission's findings concerning Transco's capacity to *deliver* gas during the relevant period were insufficient, and that the Commission should determine such questions as whether, "by physically and economically achievable acts lying entirely within the control of a pipeline or producer, sizeable reservoirs of gas might be moved from the 'possible' or 'probable' categories into the category of 'proved reserves' " (Pet. App. A, p. 10a). "Gas which could be so moved" was designated by the majority as "provable" reserves. *Id.* at 10a, n. 3. But as Judge MacKinnon pointed out (*id.* at 15a-16a, n. 1), "possible," "probable" and "provable" reserves are not recognized concepts in the industry, and no party to the proceedings suggested the appropriateness of such an inquiry. The majority's inventiveness seems inconsistent with principles of judicial deference to the expertise of administrative agencies. Whatever the court may have meant by "provable" reserves, a transition from one category to another is wholly beyond the power of any pipeline customer, such as Transco, of a gas producer.

[4]*Elizabethtown Gas Co.* v. *Federal Power Commission*, D.C. Cir. No. 76-1465, argued June 17, 1977.

February 9, 1977, the court *sua sponte* asked the parties in that case, which had been placed in abeyance pending *Transco*, whether that case should be similarly remanded for the development of evidence as ordered by the panel in this case. The Commission opposed the remand on the ground that evidence of actual shortages on the gas-supply system involved in that case was undisputed (as it is in this case). By order of March 29, 1977, the court, apparently agreeing with the Commission, set the case for argument, and it was argued on June 17, 1977.

There thus appears to be a reasonable probability that the Commission will be able to obtain a ruling on the merits of the important issue of the lawfulness of such compensation schemes in the reasonably near future.[5] In that event, the inquiry ordered here, although burdensome and unnecessary, would not in itself be sufficiently important to warrant the Commission's seeking a writ of certiorari, although we do not oppose petitioner's petition. If the court of appeals in the pending case remands that case for an inquiry similar to that ordered by the panel in this case, the propriety of such action might well be sufficiently important to warrant this Court's review. Or if the court in that case fails for some other reason to rule on the lawfulness of the compensation scheme, the order of the present panel might assume sufficient importance to merit review.

Accordingly, we suggest that this Court defer ruling on the present petition for certiorari until the District of Columbia Circuit decides the pending case. When that

[5]Because of the relevance of the pending case, we sought and obtained an extension of time in which to file a petition for a writ of certiorari to and including June 17, 1977, and subsequently sought and obtained an extension of time in which to file a response to Transco's petition to and including August 23, 1977.

decision has been rendered, we will promptly file a memorandum supplementary to this one. While we recognize that the suggestion is unusual, we believe it is warranted by the unusual posture of this case. We have been authorized by counsel for petitioner to state that petitioner has no objection to this suggestion.

Respectfully submitted.

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SEPTEMBER 1977.